Supreme Court, U.S.
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No. 97-1634

In The

# Supreme Court of the United States

October Term, 1997

LARRY EVANS,

*Petitioner,*

v.

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to an inquiry into an essential element of an administrative driver's license revocation proceeding.

2. Whether Nevada Revised Statutes 484.383(1) authorizes the arrest of an individual in violation of the individual's constitutional rights.

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**TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:**

Respondent State of Nevada, Department of Motor Vehicles and Public Safety, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Nevada filed herein by Petitioner, Larry Evans.

## I.

## STATEMENT OF THE CASE

Petitioner Larry Evans was arrested for driving under the influence of alcohol on November 28, 1994. In accordance with Nevada's implied consent law, Petitioner was asked to submit to an evidentiary test of his blood, breath or urine. Petitioner refused to be tested, so his driver's license was revoked in accordance with Nevada law. Petitioner requested an administrative hearing regarding the revocation of his driver's license.

At the hearing on February 13, 1995, the arresting officer testified, over a hearsay objection, that he responded to the location where his partner had stopped the vehicle, driven by Petitioner in an erratic manner. *See* Nevada Supreme Court Opinion, App. 2, attached to Petition. Petitioner also moved to dismiss the case on the grounds that Nevada's implied consent law is unconstitutional. *Id.* By written decision, the hearing officer denied Petitioner's motion to dismiss, overruled Petitioner's hearsay objection and upheld the revocation of Petitioner's driver's license. *Id.* The Nevada Supreme Court affirmed the hearing officer's decision.

Petitioner's request that this Court review the Nevada Supreme Court's decision is based on Petitioner's misconceptions regarding the Nevada Supreme Court's decision. Specifically, Petitioner states that the Nevada Supreme Court held: (1) the element of driving is not an issue at an administrative hearing regarding the revocation of a driver's license for driving under the influence of alcohol; and (2) an individual may be arrested for driving under the influence on a standard of less than probable cause. It is Respondent's position that the Nevada Supreme Court did not so hold. Therefore, the Petition for Writ of Certiorari should be denied, because it is not based on any important federal questions.

## II.

## REASONS FOR DENYING THE WRIT

### A. PETITIONER WAS NOT DENIED HIS RIGHT TO DUE PROCESS, BECAUSE THE NEVADA SUPREME COURT DID NOT ELIMINATE THE ELEMENT OF VEHICLE OPERATION FROM CONSIDERATION AT THE STATE LICENSE REVOCATION PROCEEDING.

The Fourteenth Amendment guarantee of due process requires that an individual, such as Petitioner, be given a meaningful opportunity to be heard before losing a driver's license. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970). Pursuant to the Nevada Administrative Procedures Act, Petitioner was entitled at his hearing to "call and examine witnesses, introduce exhibits, cross-examine opposing witnesses . . .

impeach any witness . . . and rebut the evidence against him." NRS 233B.123(4).

Petitioner's administrative hearing resulted from his driver's license revocation for refusing to comply with Nevada's implied consent law. The implied consent law states in relevant part:

> . . . any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of *a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor* or a controlled substance.

NRS 484.383(1) (emphasis added). Pursuant to the implied consent law, an individual is deemed to have given his consent to an evidentiary test for the alcoholic content of his blood or breath when a police officer has reasonable grounds to believe the individual was driving while under the influence of alcohol.

The hearing officer at Petitioner's administrative hearing found that the police officer who arrested Petitioner had reasonable grounds to believe Petitioner was driving while under the influence of alcohol. *See* Nevada Supreme Court Opinion, App. 2-3, attached to Petition. The Nevada Supreme Court affirmed this finding. *Id.* at App. 7. The court also noted that Petitioner had the

opportunity at his administrative hearing to question the police officer regarding the reasonableness of his belief that Petitioner had been driving. *Id.* at App. 6.

In his Petition, Petitioner states that he was denied the right to have the issue of driving addressed. *See* Petition for Writ of Certiorari, p. 5. To support his position, Petitioner cites *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). In *Bell*, this Court examined Georgia's statutory scheme which permitted Georgia to revoke an individual's driver's license after the licensee was involved in a car accident without any inquiry into the licensee's liability for the car accident. *Id.* at 402 U.S. 537-38, 91 S.Ct. 1588-89. This Court held that in order to avoid violating a licensee's right to procedural due process, Georgia was required to conduct "an inquiry limited to the determination whether there is a reasonable possibility of judgments . . . against the licensee" before the driver's license could be revoked. *Id.* at 402 U.S. 540, 91 S.Ct. 1590.

Similarly, Nevada requires an inquiry into a police officer's determination that he had reasonable grounds to believe an individual was driving or in actual physical control of a vehicle while under the influence of alcohol before the revocation of the individual's driver's license will be upheld. *See* Nevada Supreme Court Opinion, App. 7, attached to Petition. The Nevada Supreme Court has previously discussed the factors to be considered in analyzing whether a police officer had reasonable grounds to believe an individual was driving or in actual physical control while under the influence of alcohol. *See State of Nevada, Department of Motor Vehicles v. Torres*, 105 Nev. 558, 779 P.2d 959 (Nev. 1989).

Based on the foregoing, the Nevada Supreme Court has not eliminated vehicle operation from consideration at an administrative hearing regarding the revocation of an individual's driver's license, nor was the Petitioner denied the right to explore this issue at his hearing. Thus, Petitioner was not denied his right to procedural due process, and his Petition does not present an important federal question for this Court's consideration.

## B. NEVADA'S IMPLIED CONSENT LAW, NRS 484.383(1), DOES NOT AUTHORIZE AN ARREST ON A STANDARD LOWER THAN PROBABLE CAUSE.

Petitioner states that Nevada's implied consent law, NRS 484.383(1), is unconstitutional because it authorizes the seizure of a person on a standard lower than probable cause in violation of the Fourth Amendment. However, NRS 484.383(1) does not authorize the seizure of a person; rather, it provides that certain persons have consented to an evidentiary test at the direction of a police officer.

Nevada law provides both criminal penalties and a civil license revocation for driving under the influence of alcohol. When a police officer encounters a drunk driving suspect, Nevada's implied consent law deems that the suspect has consented to an evidentiary test under certain circumstances. If the test yields certain results, the suspect's driver's license may be revoked as a civil remedy to combat drunk driving. However, a suspect may also be arrested for the crime of driving under the influence of alcohol and subjected to criminal charges and penalties.

After Petitioner was encountered by a police officer, Petitioner was arrested for driving under the influence of alcohol. *See* Petition for Writ of Certiorari, p. 3. It is the Respondent's position that Petitioner was not arrested pursuant to the implied consent law, NRS 484.383, but rather pursuant to NRS 484.379, the criminal counterpart of NRS 484.383. This explains the Nevada Supreme Court's statement that Petitioner's arrest was not an issue at his administrative hearing or on appeal of his license revocation. *Id.* at App. 7, fn. 7.

Nevada's implied consent law is not an arrest statute; it is a consent statute that applies to all Nevada driver licensees. A license to drive on Nevada's roadways is a privilege. Certain requirements must be met in order to obtain a driver's license, and upon accepting a driver's license, the licensee agrees to abide by certain laws. One such law is the implied consent law, NRS 484.383, and it provides that any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access in Nevada is *deemed to have given his or her consent* to submit to an evidentiary test, when the test is administered at the direction of a police officer who has reasonable cause to believe that the person was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor. NRS 484.383(1).

In essence then, by accepting a driver's license, a driver in Nevada *agrees* to submit to evidentiary testing whenever a police officer has reasonable grounds to believe that he or she is driving under the influence. The implied consent refers not only to consent to be tested but also consent to be tested based upon reasonable grounds.

If an individual does not want to be subjected to such conditions, then he or she should not apply for, and cannot hold, a Nevada driver's license.

Nevada's implied consent law, NRS 484.383, does not authorize the arrest of an individual on a standard lower than probable cause, and Petitioner was not arrested under the authority of the implied consent law. Therefore, his Petition does not present an important federal question.

## III.

## CONCLUSION

Based upon the foregoing, the State of Nevada, Department of Motor Vehicles and Public Safety respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, because the Writ does not present any important questions of federal law.

DATED this 7th day of May, 1998.

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